

The Civil Society Brexit Project: Information

BREXIT AND EEA CITIZEN RIGHTS

About the Civil Society Brexit Project

The Civil Society Brexit Project is a collaboration between the **Scottish Universities Legal Network on Europe (SULNE)** and the **Human Rights Consortium Scotland**, funded by the **Legal Education Foundation**. We give information, insight and independent advice to make sure that organisations in Scotland are able to influence Brexit as much as possible. The Project will also help organisations to prepare for Brexit consequences for themselves or their beneficiaries.

www.hrcscotland.org/brexit

Who is this Civil Society Brexit Project: Information for?

This briefing is written for civil society organisations working in Scotland. For more information, contact hrcscotland@gmail.com

What areas of rights does this Information briefing cover?

The rights of European Economic Area (EEA) citizens that stem from EU free movement law, focusing on current and future EEA citizens in the UK.

In summary, the main rights are:

- the right to move and reside in another Member State
- the right to work in a host state (including as self-employed)
- the right to provide and receive services in a host state
- the right to accrue 'permanent residence' in the host state after 5 years of lawful residence
- the right to equal treatment when in the host state (to eg social assistance)
- the right to be accompanied by certain family members in the host state
- the right to certain procedural rights protecting against removal from the host state.

Although not covered further by this briefing, it is worth noting that EU citizens have additional rights beyond those associated with movement to and residence in another Member State – as an EU citizen, you can also **vote and stand as a candidate in European Parliament** and municipal elections, **petition** the European Parliament and **complain** to the European Ombudsman. And if you are **travelling outside the EU** and your country has no diplomatic representation there, you can go to the **embassy or consulate of any other EU country** and receive assistance and protection.

Which legal rights that particularly affect EEA citizens currently come from EU law, policy or regulations?

EU free movement rights are contained in:

- Primary EU Law – that is the Treaty on the Functioning of the Europe Union (TFEU) and the EU Charter of Fundamental Rights (EUCFR)
- Secondary EU Law
 - The 'Citizens Rights Directive': this sets out the conditions for EEA citizens moving to and

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residing in another Member State. (Directive 2004/38)

- The ‘Workers Regulation’: this sets out the rights of EEA workers in particular, to equal treatment in the host state in terms of employment, pay and other conditions of work and employment, as well as certain rights relating to free movement and residence. (Regulation 492/2011)
- The ‘Social Security Regulation’ sets out the coordination of Member State’s social security systems to enable the smooth determination of which Member State has the social security obligation when an EEA citizen has moved country. (Regulation 883/2004)
- The case law of the Court of Justice of the European Union, which is an important source for identifying the scope of rights in relation to free movement and EU citizenship.

Which legal rights that particularly affect EEA citizens’ residence rights are currently reserved to the UK Parliament and which parts are devolved to the Scottish Parliament?

This area of law is reserved to the UK as the entry and residence of non-UK nationals, including EEA citizens, is a reserved matter.

It may be possible, under the current constitutional agreement, for the Scottish Government to develop limited, different policies for EEA citizens in certain devolved sectors, for example Higher Education. However, this is something that is in the early stages of being explored. Options for a differentiated approach to immigration for Scotland <https://www.scer.scot/wp-content/uploads/SCER-Policy-Note-2.pdf> post Brexit have been suggested and are discussed further below.

What do we *know*, and *not know*, will happen to these legal rights when the UK leaves Europe?

In general terms, relatively sure that these legal rights will be diminished over time: the rights-based and highly permissive free movement regime will ultimately disappear and EEA citizens will be subject to a more restrictive domestic immigration regime.

After a prolonged period of uncertainty – during which it became clear that the UK Government’s preferences were significantly less generous in terms of rights than those of the EU – some much needed clarification has been reached on arrangements for EU citizens living in the UK and reciprocal rights for UK nationals living in the EU.

On 19 March 2018 the European Union and the UK published the Draft Agreement on the Withdrawal of the United Kingdom from the EU – https://ec.europa.eu/commission/publications/draft-agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community-0_en – which, in Part Two, contains the agreed position on rights of EU citizens currently in the UK; during the transitional phase beginning on 29 March 2019 and ending on 31 December 2020; and what they will be required to do to ensure they can continue to lawfully reside in the UK after transition ends.

To be clear, this ‘Draft Withdrawal Agreement’, does not have the force of law until it is finally agreed, and can be subject to change until that point. However it does offer the clearest, most comprehensive and crucially, jointly agreed, position to date. The UK has (probably inevitably) conceded significant ground, to the benefit of EU citizen’s rights, bringing comfort and relief to many. However, some questions remain unanswered for those who are not covered by the protections of the Draft Agreement.

First, what do we *know* from the Draft Withdrawal Agreement of 19 March 2018 and the UK’s implementation plans?

- EU 27 citizens arriving in the UK up to the end of the transition period (which is anticipated to begin on ‘Brexit day’, 29 March 2019, and end on 31 December 2020) will have the same rights as those who arrived before Brexit day.
- According to the Draft Withdrawal Agreement, almost all existing free movement and residence rights relating to EU citizens will continue to apply up to the end of the transition period.

- The UK government intends to require all EU citizens and family members legally residing in the UK under EU law up to the end of the transition period to apply for a new residence status – to be known as ‘settled status’ (for those who have lived in the UK for at least five years) or ‘pre-settled status’ (for those who arrive before the end of the transition period but who have not lived in the UK for five years).
- Those who attain ‘pre-settled status’ will be able to reside in the UK to enable them to acquire five years of residence. At that point, they can apply for settled status.
- Those who have already applied for and obtained ‘permanent residence’ status in the UK must also apply for the new ‘settled status’ to secure their continued right to reside in the UK in the future. The process will be simple and free of charge.
- Family rights – family members who arrive and are residing with the EU citizen before 31 December 2020 may continue to remain and apply for the new status. For those family members who want to arrive after 31 December 2020, they must have evidence of the relationship existing before 31 December 2020 and be either: the pre-existing spouse, civil partner, durable partner, child or grandchild under 21, dependent child or grandchild older than 21 or, dependent direct relative in the ascending line. Those who marry or who enter into a civil partnership after 31 December 2020 will be subject to UK immigration rules (which are likely to be much stricter).
- Other family members who are dependent upon the EU citizen, for example aunts, uncles, siblings, nieces or, nephews will be able to remain and apply for the new status if they are resident by 31 December 2020. Family members that the EU citizen is dependent upon, for example, an EU citizen child’s non-EU citizen carer, may also remain provided they were resident before the 31 December 2020.
- Children whose parents apply for settled status can apply for settled status at the same time. Children born to parents with settled status will be born British. The same applies for children born or adopted after 31 December 2020.
- Before granting settled status to an EU citizen or their family member, the UK may make more extensive criminal record checks than EU law would have allowed for the granting of permanent residence. However, problematically, it is not clear from the Draft Withdrawal Agreement whether the UK will actually be able to refuse settled status to EU citizens or their family members on this basis if criminal offences occurred before 31 December 2020 (as the EU law rule should still apply). After 31 December 2020, any new criminal convictions will be subject to UK standards and could result in removal, residence documents being revoked and the person being banned from applying for UK citizenship.
- The Draft Withdrawal Agreement does not cover Norway, Iceland, Lichtenstein and Switzerland, but it is expected to extend to those countries in the future. The Home Office have confirmed that current arrangements for Irish citizens are not affected; they will not need to apply for settled status.
- The full supervisory and enforcement powers of the CJEU will continue to apply in relation to these EU citizen rights up to the end of the transition period.

Second, what don’t we *know*, at this point?

- What the status will be of EU citizens living in the UK but not residing ‘legally’ because for example, they were not working or because they are homeless.
- What status will be available for an **EU citizen currently living outside the UK** but who has a permanent residence document for the UK, or for an EU citizen living outside the UK who has simply acquired permanent residence in the UK but does not have the document.
- **What the free movement rights will be of UK citizens who are currently residing in other EU countries.** One of the most striking aspects of the Draft Withdrawal Agreement, is that the previous mention of this group of people has been deleted. The UK position on this issue was that UK citizens who already reside in the EU should retain their right to movement within the EU after transition and withdrawal. The deleted clause in the Draft

Withdrawal Agreement had prevented this by explicitly stating that the UK citizens in other EU countries would not retain free movement rights. This issue remains to be agreed.

- **We don't know what rights will apply to the EEA citizens wishing to come to the UK in the future** (after the end of the transition period). So far, we have only broad policy intentions to go on; the UK Government is said to be considering a range of options for what the future immigration framework for EEA nationals should look like. To help them decide, they have commissioned the independent Migration Advisory Committee to report on EU migration in September 2018. A UK Government policy paper (White Paper) will likely follow shortly thereafter, in Autumn 2018, followed eventually by an Immigration Bill.

What are the main concerns around rights for EEA citizens after Brexit?

A number of vulnerable groups of EEA citizens whose rights may be at risk are apparent. This is for various reasons, such as, ambiguity in EU law and the future 'settled status', or policies and approaches undertaken by the Home Office.

- **Economically inactive EEA citizens** who do not have a right of permanent residence have been the subject of a number of recent cases at the Court of Justice which have resulted in decisions that limit their right to social assistance. This has been a grey area in the law for some time; the directive says that such migrants should be self-sufficient, but also says that they should only lose their residence right if a claim for social assistance is unreasonable. This may make establishing a right of residence in the UK difficult and in the meantime limits their right to social assistance.
- The UK plans to **require all EEA citizens to apply for 'settled status' or 'pre-settled status'** which, if granted, would confer rights as laid down in the Draft Withdrawal Agreement. They plan to make it a criminal offence not to do so. Although the Draft Withdrawal Agreement lays down important and helpful conditions applicable to the application process (Article 17) for various reasons there will

be people who do not or cannot make an application; for example, because they don't know of the obligation; they have learning difficulties or mental health problems that make the application procedure difficult. Even if only a few percent of the EEA population in the UK don't apply, this will mean that tens of thousands of people will be criminalised and have no lawful residence right.

- The **necessary evidence** that people currently need to provide to prove their work history and their continuity of residence in the UK is a 'Minimum Income Threshold' – this is a UK test and not part of EU law. It has proven problematic for workers who are part-time, on temporary, fixed term contracts or zero hours contracts and many have had their work classified as 'not work'. If this test is applied, periods considered 'not work' may make it difficult to qualify for 'settled status'. However, the Draft Withdrawal Agreement states that only evidence of work is required and that the Home Office must help the applicant prove their eligibility for settled status and must not require more supporting documents than is strictly necessary.
- **The Home Office will have a dramatic increase in workload.** The Home Office has already been criticised <https://www.freemovement.org.uk/mps-report-scathing-home-office-capacity-to-deliver-b-rexit-home-affairs-committee/> for their inadequate systems with very long waiting times. The risk is that things will go wrong and the instances of administrative injustice will rise, particularly in the context of poor legal aid and a lack of legal advice. However, the Draft Withdrawal Agreement states that if the Home Office system cannot handle the volume of applications the deadline to submit applications can be extended by one year and any technical problems must be reported to the EU institutions and to EU citizens.
- The difficulty that some resident EEA citizens may face is that until now the UK has operated on the basis of presuming that EEA citizens have a right to be here rather than requiring an application to reside or proof. This means that many people may have been **living in the UK for a long time without, strictly speaking, exercising their rights** under the Directive. This will particularly affect

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women who have been a full time care giver for their children or other dependents, or have had breaks in their employment. The requirement that all EEA citizens apply for ‘settled status’ may expose some long term EEA citizen residents to uncertainty about the lawfulness of their current and future residence. The UK has said it will not require all EEA citizens to have evidence that they have had Comprehensive Health Insurance throughout their period of residence (a requirement of the Citizen’s Rights Directive). This may make it easier for this group of EEA citizens to establish a right of residence. However, this is a voluntary exception that the UK is making and it is not in the Withdrawal Agreement Text and so could be open to change.

Even prior to Brexit, there is evidence that the rights of EEA nationals are at risk:

- For some time the UK has been pursuing a policy of implementing a ‘**hostile environment**’ for illegal immigrants. The Home Office have employed policies that have targeted vulnerable groups of people, for example **rough sleeping EEA citizens**, seeking their removal from the UK. This group of people have been found to have a poor or misinformed grasp of their EU-derived rights to reside and access housing benefit on the same terms as UK nationals. This policy was recently found by the High Court to be unlawful and it has been suspended. Other vulnerable groups who may have insecure rights or an inadequate appreciation of their rights include for example, **EEA citizen children in care and the Roma population**.
- A general effect of the Brexit era is that some EEA nationals in the UK are facing **discrimination** now in, for example, job applications and rented housing applications. This is unlawful and a breach of their current right of equal treatment under the Directive.

What about in Scotland – are there particular concerns or opportunities affecting these rights because of devolution?

The Scottish Government has been consistent in expressing its official support for continued participation in the single market including the free movement rights of EU citizens. This can be explained in part by Scotland’s particular demographic needs, where Scotland depends on migration to avoid population decline and to support its tax base. Other aspects of the Scottish economy mean that there are distinctive occupational, sectoral and regional reasons why Scotland relies on EEA citizens coming to Scotland. On this basis Scotland may seek from the UK Government a bespoke deal that provides a different immigration system for Scotland for EEA citizens. This may be achieved by devolving more powers to the Scottish Parliament or it may mean that Scotland-only immigration policies or functions are set out for Scotland. To achieve a different approach to the immigration of EEA citizens in Scotland raises questions about border control and enforcement that will require to be answered.

What happens now in the Brexit process?

- EU and UK negotiation process

Phase 1 of the Brexit negotiations was completed in December 2017 with ‘sufficient progress’ on three key issues having been declared to be achieved. One of those issues was the status and rights of EEA citizens living in the UK and UK citizens living in the EU, but some details remained to be ironed out. Phase 2 of the Brexit negotiations began in January 2017. This is focusing on agreeing the terms of a ‘transitional period’ requested by the UK Government; agreeing the overall understanding on the framework for the future relationship of the UK and the EU; and agreeing on some of the finer detail of the Phase 1 issues, including for instance what family rights attach to migrant EEA citizens under ‘settled status.’ What has been agreed to date was published on 19 March 2018 in the Draft Withdrawal Agreement. Both sides wish to conclude Phase 2 negotiations by October 2018 at the latest to enable time for the European Parliament to review and ultimately consent (or not!) to the Withdrawal Agreement,

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ahead of the scheduled Brexit date of 29 March 2019. Once the Draft Withdrawal Agreement has been finalised and approved, it will become binding in international law.

- Internal UK process

Once finalised, the UK Government has promised to implement the Withdrawal Agreement by passing a Withdrawal Agreement & Implementation Bill. Arrangements to manage the registration of existing EEA citizens will be made through existing UK secondary legislation. It is also proposed that a UK Immigration Bill will set out the post-Brexit/post-transition UK immigration system – however the publication of this has been delayed from Spring 2018 to Autumn 2018, apparently to enable the UK Government to take account of the findings of the Migration Advisory Committee’s inquiry into the costs and benefits of EEA migration. The MAC’s interim report was published on 27 March 2018.

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WHERE CAN I GET MORE INFORMATION?

Your Europe – https://europa.eu/youreurope/citizens/index_en.htm – Help and advice for EU nationals and their family
Free Movement – www.freemovement.org.uk – Updates, commentary and advice on immigration and asylum law
European Citizen Action Service – <http://ecas.org> – Information and action service
JustRight Scotland – <http://justrightscotland.org.uk/> – Law centre specialising in work with at-risk EEA nationals (eg homeless and destitute)
AIRE Centre – <http://www.airecentre.org> – Advice on Individual Rights in Europe

If there is any aspect of the briefing or a particular issue around Brexit where you would like more detailed advice or information, we are happy to help! Please get in touch with us at hrcscotland@gmail.com

There is also information available online at www.hrcscotland.org/brexit